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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1111

THE QUINAULT ALLOTTEES ASSOCIATION and INDIVIDUAL ALLOTTEES JENNIE BOOME, DANIEL STROM, and KATIE DE LA CRUZ, ON THEIR OWN BEHALF AND ON BEHALF OF ALL INDIVIDUAL ALLOTTEES OF THE QUINAULT RESERVATION,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners, the Quinault Allottees Association et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on October 17, 1973.

OPINION BELOW

The opinion of the Court of Claims is reported at 485 F.2d 1391 (1973). The slip opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Whether the Government's deduction of administrative charges from income derived from Indian trust allotments violates the General Allotment Act, 24 Stat. 388, 25 U.S.C. § 348, which says that the trust allotments shall be "free of all charge or incumbrance whatsoever."

STATUTES AND TREATY PROVISIONS INVOLVED

The Indians involved in this case come under the Treaty of 1855, known as the Treaty of Olympia, 12 Stat. 971, which provides in pertinent part:

> "ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them. . . .
>
> "ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use. . . .
>
> * * * *
>
> "ARTICLE VI. The President may . . . cause the whole or any portion of the lands to be reserved . . . to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege. . . ."

The General Allotment Act of 1887, 24 Stat. 389, 25 U.S.C. § 348, provides in relevant part as follows:

> "Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of

> the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years [since extended], in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and *free of all charge or incumbrance whatsoever. . . .*" (Emphasis added.)

United States Code, Title 25, § 406(a), provides as follows:

> "(a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution."

United States Code, Title 25, § 413, provides as follows:

> "The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of reve-

nue: *Provided*, That the amounts so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds."

STATEMENT OF THE CASE

This is a suit brought by allottees of the Quinault Reservation to recover administrative charges deducted by the United States from proceeds of the sale of their timber. The allottees contend that these deductions violate the General Allotment Act[1] which granted them a vested right to be free from these or any other charges. The Court of Claims held that the charges are permissible. The allottees seek review by this Court.

By way of historical background,[2] it was the policy of the United States in the mid-1800's to concentrate various Indian tribes of the Pacific Northwest onto reservations in order to make land available for white settlement and development. Pursuant to this policy, the United States entered into a treaty in 1855 with the Quinaults and Quileutes, whereby they ceded their territory to the United States[3] in return for a future reservation to be selected by the President for them. The treaty authorized the President to allot the future reservation to such individuals or families as were "willing to locate on the same as a permanent home. . . ."[4] The

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[1] 24 Stat. 388, 25 U.S.C. § 331 *et seq.*

[2] The case was decided below on motions for summary judgment, and there is no factual record. However, virtually all of the facts are uncontroverted.

[3] Arts. I and II. The territory consisted of an area about 100 miles by 40 miles. See *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557, 558 (1930).

[4] Art. VI.

treaty also incorporated Article VI of the Omaha Treaty, 10 Stat. 1044, which provided for forfeiture of the allotment if the allottee refused to occupy it.

In 1873 President Grant established the Quinault reservation, consisting of approximately 200,000 acres.[5] Apparently, the expectation was that the Indians would be given parcels of land which they would live on and cultivate.[6] But in fact, more than 98% of the reservation acreage is dense rain forest, and totally unfit for homesites or cultivation or any use other than forestry.[7]

In 1887, as part of the national policy of Congress to break up the reservations and move Indians into the white "mainstream," Congress passed the General Allotment Act. The Act provided that each Indian on a reservation would receive an allotment of tribal land whenever, in the opinion of the President,

> ". . . such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians. . . ."[8]

The allotments were to be held in trust by the United States for 25 years and at the expiration of the trust the United States was to convey the land to the allottee or his heirs "in fee, discharged of said trust *and free of all charge or incumbrance whatsoever.*"[9] Congress has

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[5] Executive Order, I Kapp. 923-4.

[6] See Treaty of 1855, Art. V; *United States* v. *Payne*, 264 U.S. 446, 449 (1924).

[7] *United States* v. *Eastman*, 118 F.2d 421, 422 (9th Cir. 1941), *cert. denied*, 314 U.S. 635 (1941).

[8] 25 U.S.C. § 331.

[9] 24 Stat. 389, 25 U.S.C. § 348 (emphasis added).

enacted legislation in 1906 [10] and 1934 [11] extending this trust period indefinitely.

Although the General Allotment Act made no reference to allotments of timberland, the United States in 1905 began making allotments of timberland on the Quinault Reservation to the Indians. The allotment process was suspended in 1912 when the agent observed that the land was more valuable for timber than for agricultural purposes.[12] In 1924, however, this Court ruled in *United States* v. *Payne*, note 6 above, that although the General Allotment Act referred only to grazing and agricultural lands, it did not preclude the allotment of timberlands in this case. The Government reluctantly resumed the allotment of timberlands on the Quinault Reservation and, by the time Congress repudiated the General Allotment Act policy in 1934,[13] the reservation forest had been entirely alloted in trust to some 2,340 Indians, practically none of whom lived on, nor could they live on, their allotment. It is generally recognized that the allotting of the Quinault forest was improvident. It made efficient forest management extremely difficult, thereby increasing the administrative costs which are the subject of this suit. The deed to each allotment contained the "free of all charge or incumbrance" language of the General Allotment Act.

In 1910 Congress first authorized the commercial logging of standing timber on tribal and allotted Indian lands.[14] In 1920 Congress authorized the Secretary of

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[10] 34 Stat. 326 (1906).

[11] Indian Reorganization Act of 1934, § 2, 48 Stat. 984, 25 U.S.C. § 462.

[12] *Mitchell* v. *United States*, 22 F.2d 771, 772 (9th Cir. 1927).

[13] Indian Reorganization Act of 1934, § 1, 48 Stat. 984, 25 U.S.C. § 461.

[14] Act of June 25, 1910, § 8, 36 Stat. 857 (now 25 U.S.C. § 406).

the Interior to charge "reasonable fees" for services rendered to Indian tribes or individual Indians.[15] The cutting of timber on the Quinault Reservation began in 1922 and has continued steadily to date, with administrative charges being deducted from the proceeds of each sale and the balance paid to the allottees. The charges have varied from time to time, usually between 5% and 10%.

In 1964 Congress amended 25 U.S.C. § 406 to expressly permit deductions for administrative charges, with this curious proviso—"unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution."[16] The legislative history is inconclusive as to precisely why Congress added the above-quoted language,[17] but it may be fair to assume that Congress was unsure whether the General Allotment Act's "free of all charge" language created a vested right, which under *Choate* v. *Trapp*[18] could not be eliminated without just compensation.

The allottees, petitioners, contend that these administrative charges violate the language of the General Allotment Act that the trust land "be free of all charge or incumbrance whatsoever". The Court of Claims, on cross motions for summary judgment, denied the allottees' contention.

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[15] Act of Feb. 14, 1920, § 1, 41 Stat. 415 (now 25 U.S.C. § 413).

[16] 25 U.S.C. § 406(a).

[17] See S.Rept. No. 672, 88th Cong., 1st Sess. (1963); H.Rept. No. 1292, 88th Cong., 1st Sess. (1963).

[18] 224 U.S. 665 (1912).

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF CLAIMS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

Petitioners believe that the decision below conflicts with prior decisions of this Court.

First, it conflicts with *Choate* v. *Trapp*, 224 U.S. 665 (1912). In that case the lands of the Choctaw and Chickasaw Tribes were allotted pursuant to what is known as the Atoka Agreement which was incorporated into the Curtis Act.[19] The Act provided that the allotments were to be nontaxable while owned by the original allottee, not exceeding 21 years from the date of the patent.[20] Shortly after Oklahoma became a state, Congress removed restrictions and tax exemptions from Indian lands of the type involved in that case, and Oklahoma attempted to tax the Choctaw and Chickasaw allotments. This Court held that the provision for tax exemption was a vested property right protected by the Fifth Amendment to the United States Constitution.[21]

Petitioners believe that their case and *Choate* v. *Trapp* are indistinguishable in all material respects. In *Choate* the United States, for the benefit of white settlers and to bring the Indians into the mainstream of competitive society, persuaded the Indians to relinquish their communally held lands and accept individual allotments. Here, the United States, for the very same reasons, persuaded the Indians to relinquish their ancestral territory and accept first a reservation, and then allotments thereon. In *Choate* freedom from taxation was promised while here, freedom from "all charge . . . whatsoever" was

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[19] 30 Stat. 495 (1898).

[20] 30 Stat. 507 (1898).

[21] To the same effect is *United States* v. *Nez Perce County*, 95 F.2d 232 (9th Cir. 1938).

promised. Both promises created vested property rights which cannot lawfully be abrogated without just compensation.

The Court of Claims erroneously attempted to distinquish *Choate* upon the grounds that: (1) there is here no agreement promising the allottees freedom from administrative charges[22] and (2) there is here no taking of private property for public use so as to come within the Fifth Amendment.[23] For the first proposition the court below relied upon *United States* v. *Eastman*, 118 F.2d 421 (9th Cir. 1941), *cert. denied*, 314 U.S. 635 (1941). In that case the Ninth Circuit stated without elaboration that the administrative charge did not violate the Quinaults' Treaty of 1855.[24] But that case did not involve the General Allotment Act, which contains the promissory language upon which petitioners rely, and in return for which they gave up their communally held lands and ways of life, and accepted individual allotments and the long, hard course of fitting into the white man's competitive society. Even if the *Eastman* case had held that the administrative charges were permissible under the General Allotment Act, it would be inconsistent with this Court's decision in *Squire* v. *Capoeman*, 351 U.S. 1 (1956), which construed the "free of all charge" language in the General Allotment Act to prohibit taxation of the income from a Quinault trust allotment. See discussion at pp. 11-12 below.

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[22] App. A, slip opinion at 13.

[23] App. A, slip opinion at 11.

[24] 118 F.2d at 425. It is certainly questionable whether *United States* v. *Eastman* is sound authority for the proposition that the administrative charge does not violate the 1855 Treaty. This Court in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866), held that certain Indian lands were exempt from taxation, citing treaty language virtually identical to that incorporated in Article VI of the 1855 Treaty from the Omaha Treaty to the effect that the lands were to be free from "levy, sale, execution, and forfeiture." *Id.* at 760-61.

For the second proposition, the Court of Claims was in error in stating that no Fifth Amendment taking is involved here because the administrative deductions benefit the Indians. Under 25 U.S.C. § 413, the authority upon which the Government relies for deducting administrative charges, the monies so deducted are paid into the Treasury as miscellaneous receipts. There is no statutory requirement that such funds be used to benefit petitioners by paying for the costs of timber management on the Quinault Reservation.[25] The funds for this purpose derive from general Department of Interior and Bureau of Indian Affairs annual appropriations. Furthermore, when a vested right is abrogated, the taking is not cured by the fact that the sovereign chooses to use the thing taken for the benefit of the victim. Even if the sovereign applied 100% of the fees to the management of the allottee's own timber, the allottee could still complain because the General Allotment Act entitles him to that management *without* any charge.[26]

The fact that the Government provides free services for these Indians does not mean that the Indians are being unjustly enriched. In the first place, "the deal" was that the Government would be the trustee, and do what trustees do without charge. Presumably the Gov-

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[25] As indicated earlier, the cost of administering the Quinault timberlands was significantly increased by the Government's decision to allot the reservation.

[26] The Court of Claims (App. A, slip opinion at 8) says that when the 1887 Act was passed, the Government had not at that point undertaken the obligation of managing the timber for the benefit of the Indians. This is a surprising and important error. The status of trustee, and therefore the obligation to act as trustee and prudently manage the corpus, obviously arose as each trust allotment was issued (i.e. beginning in 1905 so far as these allottees are concerned). Each of the allottees' deeds contained the statutory "free of all charge" langauge. As each trust deed was issued, it in effect constituted an acceptance of an offer made in the 1887 Act, that the Government would assume the trust responsibilities over the allotment, and would make no charge for it.

ernment had its reasons for promising this. See *Capoeman, supra*, 351 U.S. at 3, where this Court said that the Quinaults ceded their land "in exchange for protection and tutelage . . . ." Furthermore, the Government has voluntarily taken upon itself the duty to render special assistance to Indians in general so as to enable them to manage their own affairs in a complex and competitive society. The Government furnishes this assistance in a variety of ways without expecting or receiving reimbursement.[27] This is not to say that administrative fees can never be charged. It simply means that such charges cannot be made where they would violate a vested right, and under the General Allotment Act and *Choate* v. *Trapp*, the allottees had such a vested right.

Second, the decision below conflicts with *Squire* v. *Capoeman*, 351 U.S. 1 (1956). In that case the Government sought to collect taxes on the income from the sale of a Quinault Indian's timber. The same type of trust allotment and the same General Allotment Act "free of all charge" language were involved there as here. This Court held that the General Allotment Act prohibited taxes on timber income.[28]

The policy cited by the Supreme Court in *Capoeman* for exempting income derived from trust lands from taxation applies with equal force to administrative charges:

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[27] See, e.g., 25 C.F.R. Parts 21, 31, 33, 34, 80 (1973).

[28] Other courts have also construed the language of the General Allotment Act to bar various forms of taxation of allotted lands. See, e.g., *United States* v. *Hallam*, 304 F.2d 620, 622-23 (10th Cir. 1962); *Kirkwood* v. *Arenas*, 243 F.2d 863, 867 (9th Cir. 1957); *Glacier County* v. *United States*, 99 F.2d 733, 734 (9th Cir. 1938); *United States* v. *Nez Perce County, supra*, at 235. *Board of Comm'rs of Caddo County* v. *United States*, 87 F.2d 55, 56 (10th Cir. 1936); *Nash* v. *Wiseman*, 227 F. Supp. 552, 554-55 (W.D. Okla. 1963). See also *Stevens* v. *C.I.R.*, 452 F.2d 741, 744-46 (9th Cir. 1971); *Big Eagle* v. *United States*, 300 F.2d 765, 771 (Ct. Cl. 1962).

> "Respondent's timber constitutes the major value of his allotted land. The Government determines the conditions under which cutting is made. Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to his ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence. Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent. It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking." 351 U.S. at 10 (footnotes omitted).

Third, the Court of Claims decision below conflicts with decisions of this Court in still another respect. For more than 150 years, this Court has consistently required that treaties with Indian tribes and laws affecting Indians be liberally construed for their benefit and protection.[29] On the contrary, the Court of Claims construed the Act's "free of all charge" language with narrowness and hostility, and indeed in a way that does violence to its plain meaning.[30]

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[29] See, e.g., *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Squire* v. *Capoeman*, *supra*, at 6-7; *Choate* v. *Trapp*, *supra*, at 675; *Worcester* v. *State of Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

[30] The court stated that there is no ambiguity to be construed liberally in favor of the Indians (App. A, slip opinion at 15), notwithstanding the fact that this Court found the same language to be capable of considerable interpretation in *Squire* v. *Capoeman*, 351 U.S. at 6-7.

Whether the Government may deduct these charges affects the federal administration of thousands of Indian trust allotments all over the country. Twenty-five U.S.C. § 413 is a statute generally authorizing the Secretary to collect reasonable charges for "any and all work performed for Indian tribes or for individual Indians." It applies to a myriad of situations, including (according to the court below) services benefitting allotments held under the General Allotment Act. In view of the plain language of that Act that there shall be no charges, and the apparent conflict with *Choate*, *Capoeman*, and the construction cases, the decision is bound to cause widespread confusion and uncertainty, unless and until this Court makes a definitive ruling on the matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

In the United States Court of Claims

No. 102-71

(Decided October 17, 1973)

THE QUINAULT ALLOTTEE ASSOCIATION AND INDIVIDUAL ALLOTTEES JENNIE BOOME, DANIEL STROM AND KATIE DE LA CRUZ, ON THEIR OWN BEHALF AND ON BEHALF OF ALL INDIVIDUAL ALLOTTEES OF THE QUINAULT RESERVATION v. THE UNITED STATES

Charles A. Hobbs, attorney of record for plaintiffs. *Wilkinson, Cragun & Barker* and *E. Anthony Rogers*, of counsel.

Herbert Pittle, with whom was *Assistant Attorney General Kent Frizzell*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

BENNETT, *Judge*, delivered the opinion of the court:

The individual members of the class[1] of plaintiffs are

[1] In its prior consideration of this case, *Quinault Allottee Ass'n v. United States*, 197 Ct. Cl. 134, 453 F. 2d 1272 (1972), this court found that all the elements necessary to prosecute a federal "class action" were present. 197 Ct. Cl. at 140–41, 453 F. 2d at 1276; FRCP Rule 23. The court agreed to notify other potential plaintiffs of the pendency of this action and to permit them to become members of the class prosecuting the action if they so desired. Unlike the situation in an FRCP 23 class action, however, the court determined that it was not necessary or appropriate to bind allottees who failed to join this suit. Since the January 21, 1972 decision, many hundreds of individuals have elected to join this action.

owners of interests in Indian land trust allotments on the Quinault Reservation in the State of Washington. The lands are on the Pacific Coast side of the Olympic Peninsula. Plaintiffs contend that the United States, in deducting administrative charges from the proceeds of timber sales on the various allotments, interfered with their vested right not to be subject to any charges assessed on the trust allotments. Plaintiffs seek to recover the total of such charges collected since 1922, the amount to be determined later, together with interest, on alternative theories of a Fifth Amendment taking, a breach of fiduciary duty, and a breach of contract.[2] Plaintiffs invoke our general jurisdiction under 28 U.S.C. § 1491. The court concludes, however, that plaintiffs' action must be dismissed since the charges in question were authorized by law, were validly assessed by the United States and violated no treaty, contract or fiduciary duty.[3]

It was the avowed policy of the United States in the mid-1800's to remove Indian tribes from wide areas of the Pacific Northwest in order to make way for white settlers. Pursuant to this policy, in 1855, Isaac Stevens, Governor and Superintendent of Indian Affairs of the Washington Territory, began negotiations with the fish-eating tribes living on the west coast of the Territory.[4] The negotiations culminated in a treaty signed only by the Quinaults and Quileutes on July 1, 1855, and by Governor Stevens on January 25, 1856, 12 Stat. 971 [ratified March 8, 1859; proclaimed April 11, 1859].

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[2] The reasonableness of the charges is not in issue in this claim, only the right to make any charge at all. Plaintiffs have other actions pending—Ct. Cl. Nos. 772-71, 773-71, 774-71, and 775-71—raising the reasonableness and other issues.

[3] Plaintiffs' claims, resulting from administrative charges assessed before March 15, 1965 (6 years before the filing of a petition in this case), would be barred by the statute of limitations, 28 U.S.C. § 2501, as to Indians who had access to this court. *Capoeman* v. *United States*, 194 Ct. Cl. 664, 440 F. 2d 1002 (1971). Plaintiffs ask us to overrule that decision which was decided by a unanimous court. The decision in the present case makes it unnecessary to consider whether the alleged "noncompetence" of any of the plaintiff-allottees has worked to toll the statute of limitations. It will also be unnecessary to consider possible waiver by reason of powers of attorney given by plaintiffs to the forest manager authorizing the harvesting of their timber and assessment of the now contested administrative charges. The issue of interest is rendered moot by our holding as to the pending claims.

[4] These tribes were the Quinault, the Quileute, the Chehalis, the Chinook, the Cowlitz, the Hoh, and the Quit.

Known as the Treaty of Olympia, parts thereof, which are pertinent here, are as follows:

> ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them. * * *.
>
> ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use. * * *.
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> * * * * *
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> ARTICLE VI: The President may hereafter, * * * at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas [10 Stat. 1043], so far as the same may be applicable.

Article VI of the aforesaid Omaha Treaty provided the details of the method of allotment to single Indians and Indian families and for forfeiture of an allotment if an allottee neglected his land, refused to occupy it, or abandoned it and wandered from place to place. The President of the United States was authorized, in his discretion, to issue patents for assigned land, conditioned on the agreement that such land would not be aliened or leased for periods longer than 2 years. It was also provided that the land should be exempt from "levy, sale, or forfeiture" until such time as a state legislature should remove the restrictions with consent of Congress. 10 Stat. 1045 (1854). The restrictions have never been removed. The validity of this restraint upon alienation was upheld as to both land and standing timber in *Starr* v. *Campbell*. 208 U.S. 527 (1908).

In accordance with Article II of the Quinault (Olympia) Treaty, *supra*, a 10,000-acre reservation was set aside for the Quinaults and other Washington Territory tribes in 1861. This tract proved unappealing, however, on account of its

limited size and heavy concentration of timberland. The tract included only a small amount of land suitable for farming or grazing. As a result, the Quinault Agency superintendent suggested that since the coastal tribes of southwest Washington drew their sustenance almost entirely from the water, such tribes should be collected on a reservation suitable for their fishing needs. This recommendation led to an order, issued by President Grant on November 4, 1873, designating approximately 220,000 acres of the Washington coast as an Indian reservation.[5] The order provided that:

> In accordance with the provisions of the treaty with the Quinaielt [Quinault] and Quillehute [Quileute] Indians, concluded July 1, 1855, and January 25, 1856 * * *, and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory * * * be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, * * *. [*Executive Orders Relating to Indian Reservations from May 14, 1855 through July 1, 1912*, G.P.O., p. 206 (1912).]

Not as many Indians as expected moved to the new reservation following the 1873 proclamation. Many tribes chose to stay on their older and smaller reservations or ancestral homelands. This reluctance to move to the new reservation was not shortsighted, however, since only 2 percent of the 220,000-acre reservation was suitable for cultivation or for homesites. The great expanse of the 220,000-acre tract was, and still is, rain forest covered with huge, coniferous trees, some several hundred years old. Settlement on the tract was impossible except in random clearings where those Indians moving to the tract formed small villages.

On February 8, 1887, Congress passed the General Allotment Act, ch. 119, 24 Stat. 388 (1887). *Cf.* 25 U.S.C. § 331, note on Prior Law. One of the purposes of this Act was to provide Indians with the economic ability to integrate into society. This Act provided for the allotment of land in severalty to Indians on various reservations, including the Quinault Reservation. The Act authorized the President of

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[5] *Cf. Halbert* v. *United States*, 283 U.S. 753, 757 (1931), *rev'g United States* v. *Halbert*, 38 F. 2d 795 (9th Cir. 1930), and *aff'g* District Court case (unreported).

the United States to grant such allotments whenever, in his opinion, reservation land was found to be suitable for agricultural or grazing purposes. The Secretary of the Interior was directed to issue patents declaring that the United States held the allotted lands in trust for 25 years for the sole use and benefit of the individual Indian allottees. At the end of this 25-year trust period, the United States was to convey the land to the Indian allottee or his heirs "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." Ch. 119, § 5, 24 Stat. 389 (1887), 25 U.S.C. § 348. It is upon this statutory language that plaintiffs base their claim. It is their assertion that such language precludes any charges being levied against the trust, even while it is still in existence. Congress enacted legislation in 1906 [6] and again in 1934 [7] extending such trust period indefinitely.

The allotments made under the General Allotment Act were not to exceed 80 acres of agricultural land or 160 acres of grazing land. No reference was made in the Act to forest or timberland. The allotment process began in 1905 and continued without difficulty until 1911. By that time, over 750 allotments had been made, more than half of which were granted to Indians who were not members of the Quinault or Quileute tribes. For this reason, in 1911, Congress enacted legislation making clear the President's right to grant allotments to Indians not of the Quinault or Quileute tribes. This legislation directed the Secretary of the Interior to grant allotments on the Quinault Reservation—

> * * * to all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July first, eighteen hundred and fifty-five, and January twenty-third, eighteen hundred and fifty-six, and who

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[6] Ch. 3504, 34 Stat. 326 (1906):

"That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best: *Provided, however,* That this shall not apply to lands in the Indian Territory."

[7] Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984 (1934) [25 U.S.C. § 462]:

"The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress."

> may elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes: *Provided*, That the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed. [Ch. 246, 36 Stat. 1346 (1911).]

The allotment process came to a temporary halt in 1912 when the Secretary of the Interior determined that the reservation land was more valuable for its timber than for agricultural or grazing purposes.[8] The allotment process did not resume until 1924, after the Supreme Court in *United States* v. *Payne*, 264 U.S. 446 (1924), settled the question of whether the Allotment Act, in referring only to grazing and agricultural land, meant to preclude allotment of timberland. The Court ruled that it did not.

The papers before the court indicate that some 2,340 trust allotments on the Quinault Reservation were issued to individual Indians. Some of the allotted land is not now in Indian ownership but the lands of about 2,000 Indians are still in trust status. Plaintiffs are from among this group. This then is the historical and factual context within which Congress enacted the legislation which bears directly on the question presented in this case.

In 1910, Congress authorized the commercial sale of standing timber on allotted Indian lands:

> * * * the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior. [Ch. 431, § 8, 36 Stat. 857 (1910).]

Before the passage of this statute, no authority existed permitting the Quinault allottees to sell their timber.

Logging operations began on the Quinault Reservation in 1922.[9] Prior to that date, in 1920, Congress enacted legislation

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[8] In *Mitchell* v. *United States*, 22 F. 2d 771 (9th Cir. 1927), an Indian affairs agent, charged with dispersing allotments on the Quinault Reservation, testified that allotments had been discontinued in 1912 because the lands were more valuable for timber than for agricultural purposes.

[9] *Eastman* v. *United States*, 28 F. Supp. 807 (W.D. Wash. 1939), *rev'd on other grounds*, 118 F. 2d 421 (9th Cir. 1941).

authorizing the Secretary of the Interior to charge "reasonable fees" for services rendered to Indian tribes or individual Indians:

> * * * the Secretary of the Interior * * * is * * * authorized and directed, under such regulations as he may prescribe, to charge a reasonable fee for the work incident to the sale, leasing, or assigning of such lands, or in the sale of the timber, or in the administration of Indian forests, to be paid by vendees, lessees, or assignees, or from the proceeds of sales, the amounts collected to be covered into the Treasury as miscellaneous receipts. [Ch. 75, § 1, 41 Stat. 415 (1920).]

From 1920 until the present, the United States has had the authority to levy administrative charges against the proceeds of timber sales on the Quinault Reservation. The General Timber Sale Regulations of April 10, 1920, issued by the Forestry Branch of the Indian Service, Department of the Interior, provided, *inter alia:*

> * * * for the setting aside of not more than 10% of the proceeds of [the timber] sale[s] to cover the expense of advertising, marking, scaling, protection of timber, and supervision of the sale. * * *. [*United States* v. *Eastman*, 118 F. 2d 421, 423 (9th Cir. 1941),[10] *rev'g on other grounds*, 28 F. Supp. 807 (W.D. Wash. 1939).]

These statutes, and the regulations issued thereunder, remained substantially unchanged until 1964 when Congress revised the 1910 Act. The amended provision incorporated a reference to the 1920 Act (25 U.S.C. § 413) and provided that—

> The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the

[10] The General Forest Regulations of April 23, 1936, called for an 8-percent deduction from the "gross amount received for the timber sold under regular supervision from allotted or from unallotted land." This amount was to cover the cost of "examining, supervising, advertising, collecting, disbursing, accounting, marketing, scaling, caring for the slash, and protecting from fire the timber and young growth left standing on the land being logged or upon adjacent land." 25 C.F.R. § 61.25 (1939). When there was no administration by the Indian Service subsequent to a sale, a deduction of 3 percent of the sale price was to be taken "to cover the cost of estimating the timber and effecting the sale." 25 C.F.R. § 61.25 (1939). The amount of the deductions for administration was changed to 10 percent and 5 percent, respectively, in 1944, and has remained at that level to the present. 25 C.F.R. § 61.25 (1944); 25 C.F.R. § 141.18 (1973).

> Secretary of the Interior, and the proceeds from such sales, *after deductions for administrative expenses to the extent permissible under section 413 of this title*, shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. * * *. [New language italicized. Sec. 8(a), 78 Stat. 187 (1964); 25 U.S.C. § 406(a).]

and that—

> * * * It is the intention of Congress that a deduction for administrative expenses may be made in any case *unless the deduction would violate a treaty obligation or amount to a taking of private property* for public use without just compensation in violation of the fifth amendment to the Constitution. * * *. [Emphasis supplied. Sec. 8(a), 78 Stat. 187 (1964); 25 U.S.C. § 406(a).]

Plaintiffs claim that the Government has breached its promises to them made in the General Allotment Act, by which it promised no charge or encumbrance on their future fee, by many years later creating an administrative charge for handling some aspects of the Indian trust. It is obvious that when Congress wrote the language of the General Allotment Act, it did not have in mind at all the possibility of the administrative charge which came 33 years later. In 1887 Congress was speaking only in conventional terms of an encumbrance on the fee, such as would be represented by a lien or a mortgage. The Government has never violated that commitment. In 1887, when the General Allotment Act became law, there was no statutory authority for sale of the timber. This arose much later in 1910, and was followed by other statutory authority for the administrative charges in 1920. When the 1887 Act was passed, the United States had not at that point undertaken the obligation of timber management and sale for the benefit of the Indians, so it cannot be said that at that point they were entering into a contract to manage a property free of charge, as plaintiffs claim. If the United States assumed any such special duty to the Indians in this connection it would be in the Treaty of 1855 but plaintiffs admit that it is not there. No subsequent act of Congress changed the treaty, broke any contract, or took any private property of plaintiffs.

Plaintiffs misinterpret the language of the General Allotment Act. That Act only provides that, when the trust in

favor of the Indian allottees is terminated and the land is transferred to such allottees in fee, such property will be transferred to the allottees free of any debts, liens or similar encumbrances. The purpose of the General Allotment Act of 1887, as already stated, was to lay a foundation for integrating Indians into the mainstream of American society. As such, the Act sought to establish Indians financially so that the reservations could be dissolved and the Indians living thereon could be integrated into modern society. The Allotment Act was a means of staking such Indians so that they would have the wherewithal to survive economically once the umbilical cords tying them to reservations were severed. It was entirely consistent with this purpose that Congress sought to insure that the Indians would eventually receive their fee to allotted lands with no strings attached.

Nothing in the 1887 Act, however, prohibits reasonable administrative charges against the proceeds from such allotted lands while held in trust and administered by the United States. This is consistent with the law of trusts which does not require that a trustee gratuitously contribute his services, absent an express agreement to the contrary.

> A trustee can properly incur expenses which are necessary or appropriate for the carrying out of the purposes of the trust. (Footnote omitted.) When such expenses are properly incurred, they should ultimately be borne by the trust estate rather than by the trustee personally. [III Scott. Trusts § 244 (3d ed. 1967); *see generally Trustees* v. *Greenough*, 105 U.S. 527, 532 (1881).]

There is no indication in the legislative history to the 1964 statutory amendments that Congress was much concerned about its authority to levy such administrative charges against the timber proceeds under 25 U.S.C. § 413.[11] The legislative history shows that the major purpose of the 1964 amendment to 25 U.S.C. § 406(a) was to provide the statutory basis for modernizing timbering operations on Indian reservations. Under the 1910 Act, the Interior Department was not

[11] 25 U.S.C. § 413: ch. 75, § 1, 41 Stat. 415 (1920), amended, ch. 158, 47 Stat. 1417 (1933):

"The Secretary of the Interior is authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue: * * *."

authorized to meet the 1964 "standards of timber harvesting in accordance with principles of sustained yield, or to permit the removal of immature trees of poor quality or undesirable species." H.R. REP. No. 1292, 88th Cong., 2d Sess. (1963), 1 U.S. CONG. & ADM. NEWS 2162 (1964); S. REP. No. 672, 88th Cong. 2d Sess. (Nov. 27, 1963). Ancillary to this major purpose was the incorporation by reference of the provisions of the 1920 Act concerning administrative charges (now 25 U.S.C. § 413) into the amended 1910 Act. This change was described by Assistant Secretary of the Interior, John A. Carver, Jr., as a "technical amendment" not changing the present law. 1 U.S. CONG. & ADM. NEWS 2164 (1964). Plaintiffs' attempt to attribute to Congress a Machiavellian motive to circumvent the no "charge or incumbrance" language of the General Allotment Act by the 1964 amendment to section 406(a) lacks a substantial basis in fact.

Additionally, the late John W. Cragun, before his decease a member of the distinguished law firm representing plaintiffs in this action, testified before Congress that the incorporation of language authorizing an administrative charge of 10 percent against the timber proceeds would be in violation of the trust established by the 1887 Allotment Act. Congress, however, rejected the arguments propounded by Mr. Cragun and amended section 406(a), as heretofore shown. Since Congress, before it enacted the 1964 amendments, had opportunity to consider the same arguments as are now being made to this court, it would seem presumptuous for us to make an interpretation of the legislative history at variance with what Congress so plainly did. As plaintiffs suggest, Congress anticipated this suit, after the Cragun testimony, when it wrote into the law that the charges should not "violate a treaty obligation or amount to a taking of private property for public use, without just compensation." Sec. 8(a), 78 Stat. 187 (1964); 25 U.S.C. § 406(a). This language made no substantive change in the prior law as to administrative charges. Those charges are now alleged to be in conflict with the General Allotment Act of 1887. But, the subsequent enactments which authorized and reaffirmed them through 1964 were specific and dispose of any arguments about congressional intent or authority in the matter arising from the 1887 Act. The 1964 Act raised two caveats about the charges, in appar-

ent deference to Mr. Cragun. First, it cautioned that the charges should not violate any treaty. *United States* v. *Eastman*, *supra*, has settled that by saying that the charges do not violate the 1855 Treaty. Second, it was said that there must be no taking of private property for public use, as prohibited by the Fifth Amendment. The questioned charges are not a taking of plaintiffs' property for public use. Congress permitted reasonable charges, as first outlined in the 1920 Act, for the advertising, marking, scaling, protection of timber, and supervision of the sale thereof, which were all designed for plaintiffs' use and benefit. There is no showing in this case of a breach of fiduciary duty whereby the United States as trustee made more than a reasonable charge for the services from which plaintiffs have so greatly benefited.

We hold that the two sins flagged by the 1964 amendments have not been committed. Indians not fully emancipated from the control and protection of the United States are subject to its legislation. Long ago the Supreme Court affirmed this authority of Congress to exercise the plenary power of the United States over Indians. It said that such a power "has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903).

It follows, therefore, that Congress had the power to authorize the charges now in issue just as it had the power, earlier, to provide in the General Allotment Act that when the fee to the allotted land is passed to the allottees it should be without a cloud on it. The Indians say that they have received patent deeds, free and clear, signed by the President.[12] But, the deeds recite the language of the General Allotment Act that the land is held in trust and that when the trust terminates the fee will then pass without charge or encumbrance against it. It is from the operation of the trust that the charges here have arisen. The charges do not run against the titles or cloud them in any way as an unpaid tax would.

[12] In another case involving a Quinault Indian allottee, the Supreme Court said in a footnote: "The term 'patent' inadequately describes respondent's interest. 'Congress • • • was careful to avoid investing the allottee with the title in the first instance, and directed that there should be issued to him what • • • is in reality an allotment certificate • • •.' *Monson* v. *Simonson*, 231 U.S. 341, 345." [*Squire* v. *Capoeman*, 351 U.S. 1, 4 (1956).]

The charges are deducted when the timber is sold and do not encumber the fee or constitute a possible lien on it.

In *United States* v. *Eastman*, 118 F. 2d 421 (9th Cir. 1941), *rev'g on other grounds*, 28 F. Supp. 807 (W.D. Wash. 1939), six individual Quinault allottees brought suit to contest the validity and application of some of the very authority involved in the present case. They said that the deduction of the administrative charges violated the 1855 Treaty. The Ninth Circuit rejected that contention and ruled that the treaty did not immunize the timber proceeds from charges authorized by the 1920 statute and regulations promulgated thereunder. The court said that it found "nothing in the [1855] treaty which could be thought to limit the power of Congress" to make such assessments. *United States* v. *Eastman*, 118 F. 2d at 425. The court noted that the trust patents of plaintiffs were issued in conformity with the General Allotment Act of February 8, 1887, and contained the usual references thereto. However, the impact, if any, of the General Allotment Act on the administrative charges was not presented to the court. For the reasons shown herein, we do not think it makes any difference, or would have made any difference, in *Eastman*. Plaintiffs concede that nothing in that Act *or* in the treaty prohibits the charges. They place their sole reliance upon certain court decisions which they say compel a result in their favor and urge that we disagree with the decision in *Eastman*, a challenge which we respectfully decline.

Plaintiffs' argument that there is no tenable difference between *Choate* v. *Trapp*, 224 U.S. 665 (1912), and this case, is also misplaced. In that case the Choctaw and Chickasaw tribes, in Oklahoma, negotiated agreements with the United States to give up their communal lands in consideration of land patents to be allotted to the 8,000 individual tribal members who would thereupon surrender any rights they had to the property formerly held in common. These agreements were incorporated into the Curtis Act of 1898, ch. 517, 30 Stat. 507, which specified that the land allotment was to be nontaxable while owned by the original allottee, but not to exceed 21 years from the date of the patent. Also, one-half of each allotment was inalienable for 21 years. This vested

right of nontaxability was written into the Constitution of the State of Oklahoma. Congress, thereafter, in 1908, passed a general act removing restrictions and tax exemptions from land held by Indians of the class to which these Indians belonged. Oklahoma, thereupon, attempted to tax the allotments. The Supreme Court held that removal of restrictions on alienation of Indian allotments falls within the power of Congress to regulate Indian affairs, citing *Lone Wolf* v. *Hitchcock*, *supra*, but that the specific provision for nontaxation was a vested property right protected by the Fifth Amendment, was binding on both the Nation and the State, and was not subject to impairment or abrogation by either. In contrast, while tax exemption was promised in *Choate*, arising from valid agreement, no equivalent agreement of freedom from administrative charges was made in the instant case. *United States* v. *Eastman*, *supra*.

Plaintiffs also place great reliance upon *Squire* v. *Capoeman*, 351 U.S. 1 (1956). That case was brought by a Quinault allottee to recover capital gains taxes paid on the proceeds of timber sold from his allotment. Capoeman made the same argument that he and other plaintiffs now make here.[13] He said that the taxes collected were in violation of the provisions of the Treaty of 1855, the trust patent, and the General Allotment Act. The Supreme Court held that collection of the tax was indeed inconsistent with the Government's promise in the General Allotment Act to transfer the fee "free of all charge or incumbrance whatsoever." The Court said that although this statutory provision is not expressly couched in terms of nontaxability, since doubtful expressions are to be resolved always in favor of the Indians who are wards of the Nation, the general words "charge or incumbrance" might well be sufficient to include taxation. But, the Court did not base its holding on that supposition. It has said repeatedly that in ordinary affairs of life not governed by treaties or remedial legislation "[e]xemptions from taxation do not rest upon implication (footnote omitted)." *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939); *see*

[13] In *Capoeman* v. *United States*, 194 Ct. Cl. 664, 440 F. 2d 1002 (1971), plaintiff's challenge to collection of the administrative charges was rejected by the court on the grounds of the statute of limitations, as to which plaintiff was not "noncompetent."

Oklahoma Tax Comm'n v. *United States*, 319 U.S. 598 (1943). This doctrine was recently cited with approval in *United States* v. *Mason*, 412 U.S. 391 (1973). The *Capoeman* Court pointed out that section 6 of the Act had been amended to include a proviso giving the Secretary of the Interior authority to determine an Indian allottee to be competent and, in such event, to issue to him a patent in fee simple "* * * and thereafter all restrictions as to sale, incumbrance, or *taxation* of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent * * * (emphasis supplied)." 351 U.S. at 7. From this language the Court reasoned that Congress implicitly meant there should be no taxation of an incompetent Indian who had not received his patent in fee simple.

The justice and logic of that holding is plainly sound. "'[I]t is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.'" *Squire* v. *Capoeman*, 351 U.S. at 8. The trustee's duty is to preserve the trust and income therefrom to further the goal of qualifying the Indian to take his place in modern society. The Court said: "This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent." 351 U.S. at 10.

The question now is whether the administrative charges can fairly be equated to taxes under the foregoing rationale. We think not. No language in the 1855 Treaty, the Allotment Act, or any subsequent trust agreement dealt with such a charge in the same clear manner as the proviso to section 6 of said Act (now 25 U.S.C. § 349) treats imposition of taxes. While a capital gains tax is paid on, and for, realized accessions to wealth, the administrative charges in the present case have been authorized in return for many services (see the 1920 Act, *supra*) rendered in plaintiffs' favor by the Government to preserve and increase plaintiffs' wealth. If it did not make sense to tax the ward for the benefit of the guardian, by the same token it makes little sense to charge the trustee for services to the ward which would violate the trust if not performed.

Plaintiffs' contention that *Eastman* must be reconsidered in light of *Capoeman* must fail. In *Capoeman*, the Supreme

Court cited *Eastman* for the proposition that "[t]he Government determines the conditions under which the cutting is made." 351 U.S. at 10. It was plainly aware of the holding in that case and cast no shadows over its viability, although, of course, administrative charges for timber handling were not directly involved in *Capoeman*. In the present case, the United States, in valid exercise of its plenary power, enacted legislation providing for the assessment of reasonable administrative charges against the Quinault allottees for services rendered to them in the preservation and sale of their timber. This practice has a standing now of 53 years with the Quinaults and has received continuous congressional approval. There is no ambiguity here to be resolved by the rule of giving the Indian benefit of all doubt.[14]

The practice of deducting reasonable charges to help cover the costs of selling tribal lands, buildings, collection of rents and royalties, administering Indian moneys, appraising timber, and certain other activities for benefit of Indians, has long been recognized as appropriate by this court in certain circumstances. In the court's extensive analysis of such matters in *Choctaw Nation* v. *United States*, 91 Ct. Cl. 320 (1940), *cert. denied*, 312 U.S. 695 (1941), the court reaffirmed that "the rule as to construction of treaties with the Indians most favorable to the Indians does not extend to the point of permitting the court to indulge in presumptions and implications of assumed obligations by the government where the attendant facts and circumstances clearly negative any intention upon the part of the government to assume such obligations." 91 Ct. Cl. at 370. While that case involved a tribe, and the instant case involves claims by individual Indian allottees, there is no apparent reason to distinguish the propriety of such practices as here questioned, since we conclude that the General Allotment Act on which plaintiffs base their claims gives them no rights that the tribes do not have as to these particular administrative charges. To hold otherwise would also unjustly enrich plaintiffs at the expense of the Govern-

[14] "The rule that words in treaties with, and statutes affecting, Indians, must be interpreted as the Indians understood them is not applicable where the statute is not in the nature of a contract and does not require the consent of the Indians to make it effectual." *United States* v. *First Nat'l Bank*, 234 U.S. 245 (1914), and quoted with approval in *Capoeman* v. *United States*, 194 Ct. Cl. at 677, 440 F. 2d at 1008.

ment which is not claimed in this case to have derived benefit or profit from these sales of timber. Plaintiffs, as previously noted, concede that neither the Quinault Treaty nor the General Allotment Act prohibits these charges. Fundamentally, their contention is that, since the Supreme Court has held in cases involving taxes that the amended General Allotment Act specifically prohibits taxation of Indian gain from timber sales, a charge for administering an Indian trust allotment, although specifically authorized by statute since 1920, must, by implication, also be prohibited. We believe that result does not follow in this case, for the reasons given. We do not, of course, pass on the propriety of other charges or of any taxes imposed with respect to this property.

In conclusion, the court finds that the United States had proper authority, under 25 U.S.C. § 406(a) and § 413, to assess reasonable administrative charges against the proceeds of timber sales on the Quinault Reservation from allotments owned by individual Indians, and administered in trust by the United States. The plaintiffs have shown no taking of their property for public purposes, no breach of contract, or no violation of fiduciary duty, treaty, statute or regulation. It follows that plaintiffs, therefore, have failed to state a claim for which relief may be granted.

The defendant's motion for summary judgment is granted. Plaintiffs' cross-motion for partial summary judgment is denied. The petition is dismissed.

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No. 73-1111

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE QUINAULT ALLOTTEES ASSOCIATION, ET AL.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App.) is reported at 485 F.2d 1391.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1973. The petition for a writ of certiorari was filed on January 15, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the United States may charge individual Indians a reasonable service charge to cover the costs of administering the sale of timber on their allotted trust lands.

537-028—74——1

STATUTES AND TREATY PROVISIONS INVOLVED

The pertinent statutes and treaty provisions are set out in the petition for a writ of certiorari at pages 2–4.

STATEMENT

This is a suit by allottees of the Quinault Reservation to recover administrative charges deducted by the United States from the sale of their timber. The Court of Claims held that the charges are valid and dismissed the complaint. The petitioners seek review in this Court.

In 1855 the United States entered into a treaty with the Quinaults, Quileutes, and related tribes, whereby the Tribes ceded their territory to the United States in return for a future reservation to be selected by the President of the United States.[1] This treaty contained provisions for future allotments of tracts of land to individual Indians under the terms set forth in the treaty with the Omahas. That treaty in turn provided that, until all restrictions were removed, allotted land would be free from "levy, sale, or forfeiture" (Pet. App. 3). The Quinault Reservation established pursuant to the treaty contained approximately 200,000 acres of land, of which 98 percent was forest.

In 1887 Congress enacted the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. 331, *et seq.*, which provided for the allotment of tribal land to individual Indians. These allotments were to be held by the United States in trust for the individual owners for a

[1] Treaty of 1855, 12 Stat. 971. The history summarized in this Statement is set forth in more detail in the opinion below. Pet. App. 2–8.

period of twenty-five years (a period subsequently extended indefinitely by Congress), after which the land was to be conveyed to the allottee or his heirs "in fee, discharged of said trust and free of all charge or incumbrance whatsoever." 25 U.S.C. 348.

In 1905, the United States began making allotments of timberland on the Quinault Reservation. This practice was suspended in 1912 because there was some doubt whether allotments of timberland were permissible under the General Allotment Act. In 1924, this Court ruled such allotments permissible, *United States* v. *Payne*, 264 U.S. 446, 449, and the allotment program was resumed. By 1934, when the allotment program was ended by Congress,[2] most of the reservation forest had been allotted in trust to 2,340 Indians.

Congress first authorized the commercial logging of tribal or allotted Indian lands in 1910 in an Act which has been codified as 25 U.S.C. 406.[3] In 1920, Congress authorized the Secretary of the Interior to charge "reasonable fees" for miscellaneous services rendered to Indian tribes or individual Indians, 25 U.S.C. 413.[4] In 1964, Congress amended 25 U.S.C. 406 to authorize expressly the deduction of reasonable costs for the administration of timber sales from the proceeds of such sales.

The commercial cutting of timber on the Quinault Reservation began in 1922 and has continued to the present date (Pet. App. 6–7). During this time the

[2] Indian Reorganization Act of 1934, Section 1, 48 Stat. 984, 25 U.S.C. 461.

[3] Act of June 25, 1910, Section 8, 36 Stat. 855, 857.

[4] Act of February 14, 1920, Section 1, 41 Stat. 408, 415.

Secretary of the Interior has charged a fee, usually between five and ten percent of the sale price, for the costs of administering the timber sale and related expenses (Pet. 7). It is this fee which petitioners claim is in violation of the terms of their treaty and of the General Allotment Act provision that allotments be "free of all charge or incumbrance whatsoever."

ARGUMENT

The decision of the Court of Claims is correct, and presents no question warranting review by this Court.

1. The decision below recognizes that Congress has the authority, where it sees fit, to charge Indians, who are under the protection of the United States, the reasonable costs of some of the services afforded them. Although we know of no cases on this precise issue decided by this Court, the practice of making reasonable charges for certain services rendered Indians has been in existence at least since 1920, and has been approved previously by the Court of Claims. *Choctaw Nation* v. *United States,* 91 C. Cls. 320, certiorari denied, 312 U.S. 695. The precise authority at issue here was also upheld in *United States* v. *Eastman,* 118 F. 2d 421 (C.A. 9), certiorari denied, 314 U.S. 635. We know of no cases holding to the contrary.

Although the United States provides many services for Indians free of charge, there is no requirement that all such services must be free. The Court of Claims properly held (Pet. App. 9):

> Nothing in [the General Allotment Act of 1887], however, prohibits reasonable administrative charges against the proceeds from such allotted lands while held in trust and administered by the United States. This is consistent with the law of trusts which does not require that a trustee gratuitously contribute his services, absent an express agreement to the contrary.
>
> > A trustee can properly incur expenses which are necessary or appropriate for the carrying out of the purposes of the trust. (Footnote omitted.) When such expenses are properly incurred, they should ultimately be borne by the trust estate rather than by the trustee personally. [III Scott, Trusts § 244 (3d ed. 1967); see generally *Trustees* v. *Greenough*, 105 U.S. 527, 532 (1881).]

In the present case, the United States in accordance with specific Acts of Congress (see p. 3, *supra*) charged reasonable fees [5] for some of its trust services to the petitioners. The Court of Claims properly upheld its right to do so.

2. Petitioners argue that the government's administrative charges are analogous to a tax, and as such are forbidden under the guaranty of the General Allotment Act that when the restrictions on the land are ended, the land will be conveyed to the allottee free of any charge whatsoever. They cite *Choate* v.

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[5] The reasonableness of the charges is not at issue in this appeal, but is at issue in other cases brought by the petitioners and pending in the Court of Claims. See Pet. App. 2, n. 2.

Trapp, 224 U.S. 665, and *Squire* v. *Capoeman*, 351 U.S. 1, for the proposition that the guaranty creates an immunity from taxation by the federal government, and, by analogy, an immunity from fees such as those in question here. They also argue that freedom from such charges is a property right established by their treaty which Congress cannot take away without just compensation.

Their reliance on these cases, however, is misplaced. *Choate* concerned allotments to Choctaw and Chickasaw Indians under the Curtis Act of 1898, 30 Stat. 495. That Act provided that the allotments were to be held in trust by the United States and were to be nontaxable for 21 years from the date of allotment. 30 Stat. 507. A later Congress removed the restrictions on the land and provided that the land would henceforth be subject to taxation. This Court held that the provision for tax exemption, which was part of the bargain under which individual Indians gave up their interest in tribal lands in return for allotments, was a "vested property right which could not be abrogated by statute." 224 U.S. at 678–679.

Here the treaty provides that the allotted land shall be free from "levy, sale, or forfeiture" and the statutory language provides that at the expiration of the government trust the United States will convey the land to the allottee "free of all charge or incumbrance whatsoever * * *" (Pet. App. 3, 5). Those requirements are not violated by the government's requiring a reasonable charge for service rendered in connection with the sale of timber on the land—a charge that creates no lien or encumbrance on the land and which does

not inhibit the return of the land to the allottee free and clear at the end of the trust period.

In *Squire* v. *Capoeman, supra,* this Court held that the government's statutory duty to return lands to Indian allottees free of any lien or encumbrance evidenced a congressional intent that the land not be taxed pending such return—an intent which made inapplicable the general provisions of the Internal Revenue Code which would otherwise have applied to the profits from a sale of timber. This holding was specifically based on the Court's interpretation of the intent of Congress in enacting the relevant provisions of the Internal Revenue Code. 351 U.S. at 8–9.

In the present case, on the other hand, Congress has specifically authorized the charging of the administrative expenses in question. Moreover, no tax is involved. The United States is simply charging a fee for a service actually rendered—a fee to cover costs incurred whenever timber is properly managed, cut, and sold, whether the land is under federal trusteeship or not. Since petitioners' case is based on the alleged impermissibility, of charging any fee at all for these services and not on an allegation that the charges are unreasonable or go beyond recoupment of actual expenses, the Court of Claims correctly dismissed the petition.[6]

[6] Since the fees are assessed under specific congressional authorization and there is no allegation that they go beyond the benefits bestowed, there is no conflict between the decision of the Court of Claims and this Court's recent decisions in *Federal Power Commission* v. *New England Power Co., et al.*, No. 72–1162, and *National Cable Television Assn, Inc.* v. *United States*, No. 72–948, decided March 4, 1974. See *National Cable, supra*, slip. op. at 4–5.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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